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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RICHARD GERALD JORDAN,
Petitioner

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Where hearsay evidence relating to post crime prison behavior is excluded on the grounds of it being incompetent and not reasonably relevant to the question of whether petitioner should be sentenced to death or be sentenced to life in prison there is no violation of Lockett v. Ohio, 438 U.S. 586 (1978) or the requirement that there be individualized sentencing and certiorari should be denied.

2. The Court should deny the writ because the rationale underlying the strict interpretation of the statutory aggravating circumstances of "especially heinous, atrocious or cruel" in Godfrey v. Georgia, 446 U.S. 420 (1980) is not applicable under the Mississippi capital murder statutory framework.

3. Where the comments of the prosecutor during the closing arguments of the sentence phase relating to the fact that petitioner had not testified at previous trials did not violate any rights guaranteed under the Fifth, Sixth, Eighth, or Fourteenth Amendments certiorari should be denied.

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STATE OF MISSISSIPPI,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of the State of Mississippi is reported as Jordan v. State, 464 So.2d 475 (Miss. 1985). A copy of the opinion is before the Court in petitioner's Appendix to Petition for Writ of Certiorari to the Supreme Court of Mississippi at 1a-33a.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. § 1257(3). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments Five, Six, Eight and Fourteen. He

also relies on Section 99-19-101, Miss. Code Ann. (Supp. 1984).

STATEMENT OF THE CASE

The petitioner, Richard Gerald Jordan, was indicted on March 26, 1976, in the Circuit Court of the First Judicial District of Harrison County, Mississippi for the January 13, 1976 kidnapping and murder of Edwina Marter. On motion for change of venue the matter was transferred to the Circuit Court of Jackson County, Mississippi where petitioner was tried and automatically sentenced to death. Within the time for the granting of a new trial the Mississippi Supreme Court decided Jackson v. State, 337 So.2d 1242 (Miss. 1976), holding that automatic imposition of the death penalty was improper. The trial court granted the motion for new trial and Jordan was again put to trial under the guidelines imposed by

the court in Jackson, supra, concerning jury sentencing. Jordan was again convicted of capital murder and sentenced to death, this time by the jury. The Mississippi Supreme Court affirmed on direct appeal and rehearing was denied. Jordan v. State, 365 So.2d 1198 (Miss. 1979). Certiorari was denied by this Court in Jordan v. Mississippi, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979). Petitioner then petitioned the State Supreme Court for post-conviction relief. This petition for writ of error coram nobis was denied. In re Jordan, 390 So.2d 584 (Miss. 1980).

On January 3, 1980 prior to filing his petition for coram nobis relief, Jordan filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Mississippi. These proceedings were stayed pending exhaustion of all claims in the state courts. On March 19, 1981 the

Honorable William Harold Cox, United States District Judge, denied the petition, and an appeal to the United States Court of Appeals for the Fifth Circuit ensued. On August 6, 1981, the Fifth Circuit affirmed in part and reversed in part the decision of the district court, vacating the sentence of death. Thereafter a petition for rehearing was denied. Jordan v. Watkins, 681 F.2d 1967, reh. den. sub. nom., Jordan v. Thigpen, 688 F.2d 395 (5th Cir. 1982). The State elected not to file a petition for writ of certiorari with this Court.

A new sentencing hearing was held by the Circuit Court of Harrison County, Mississippi, First Judicial District and a death sentence returned in proper form by the jury on April 29, 1983. This marked the third time that Jordan had been sentenced to death. On automatic appeal to the Mississippi Supreme Court the sentence of death was again affirmed

on January 30, 1985. Rehearing was denied on March 13, 1085. Jordan v. State, 464 So.2d 475 (Miss. 1985).

The facts reflected by the record show, that on or about January 10, 1976, in Baton Rouge, Louisiana, petitioner, traded a shotgun for a .38-caliber revolver. Then he came to Gulfport, Mississippi, and obtained lodging at the Twin Star Motel where he registered as "Jack Wilson." With kidnapping in his mind, and using the fictitious name of "Jack Wilson," Jordan called the Gulf National Bank and expressed a desire to speak to the commercial loan officer. He was referred to Mr. Marter, whose wife was soon to be Jordan's victim. Perusal of the telephone directory revealed to Jordan only one Gulfport listing of the name "Marter." Having obtained the Marter address from the directory, Jordan drove by the Marter residence where several cars were parked, including a Mercedes and a sports car. After

all but one of the cars was driven away, Jordan dialed the Marter residence telephone number and heard a female's voice answer. Then he decided to make his move.

Dressed in a sport coat, tie and knit pants, and carrying a manilla folder, Jordan went to the Marter residence. He rang the door bell and was greeted by Mrs. Marter whom he told that his electrical company had received information of defective circuit breakers in the area which he was investigating. Mrs. Marter admitted him inside, whereupon he kidnapped Mrs. Marter at gunpoint and took her away, leaving her three-year-old son asleep in the house. At his command, she drove him out into the sparsely settled DeSoto National Park wooded area. They traveled down a logging road to where he ordered her out of the car, telling her that she would stay there with his partner until he obtained money from her husband, after which he would release her. She became

extremely fearful when she discovered there was no partner there, and petitioner forced her onto her knees and shot her in the back of the head. [1] He then went to a telephone and called Mr. Marter at the bank. Demanding $25,000, Jordan stated: "We have your wife . . ." and gave Marter directions how to deliver the money up on Highway 49. Marter quickly obtained the money, but his efforts to drop it where directed failed because he did not find the coat (beside the highway) upon which he was supposed to drop the money. Being fearful on account of two vehicles following Marter, Jordan had decided not to put out the coat.

Jordan took the .38-caliber revolver (the murder weapon) and threw it into the Big Biloxi River, from which it was later recovered after

---

[1] Jordan, a self-described marksman, claims he shot Marter in the back of the head as she was running away from him.

he revealed its location. Before Mr. Marter again attempted to deliver the money as directed by a second telephone call from Jordan, the money was serialized and microfilmed with FBI officers then actively investigating the matter. During this second telephone conversation between Jordan and Mr. Marter, Jordan assured Marter that his wife was all right, and demanded that Marter drop the money on Interstate Highway 10. Marter proceeded as Jordan directed; this time he found the coat and dropped the money on it. Two officers, Deputy Sheriff Larkin Smith and FBI Agent Shepherd, having been made aware of what was going on, were positioned near the scene of the drop and saw Jordan place a coat there. Soon they saw him pick up the money, after which they gave chase as high speed. During the chase, Jordan rammed his car into the vehicle of the officers, running them off the road. They shot at his receding car, but

Jordan continued his flight although his car was rendered partially disabled when, in the ramming episode, a bent fender came in contact with a tire. Farther on, Jordan abandoned his vehicle at a shopping center, hide the money in the woods, went to another shopping center, and, at a T. G. & Y. store, purchased a red jump-suit which he donned before he left the store. He got a taxi at the shopping center and told the driver to take him to the Twin Star Motel. Not knowing that Jordan was the man for whom a large search was under way, the taxi driver told Jordan that roadblocks were up and that the officers were looking for someone. En route to the motel, the taxi was stopped and an officer identified Jordan from a picture already obtained by the FBI. The officer arrested Jordan and turned him over to the FBI. That afternoon, January 13, 1976, Mrs. Marter's body was found. On the next day

a diver from the Gulfport Fire Department retrieved the murder weapon from the river.

REASONS FOR DENYING THE WRIT

Petitioner has presented no federal question of sufficient substance that would warrant the granting of this petition for writ of certiorari.

ARGUMENT

1. WHERE HEARSAY EVIDENCE RELATING TO POST CRIME PRISON BEHAVIOR IS EXCLUDED ON THE GROUNDS OF IT BEING INCOMPETENT AND NOT REASONABLY RELEVANT TO THE QUESTION OF WHETHER PETITIONER SHOULD BE SENTENCED TO DEATH OR BE SENTENCED TO LIFE IN PRISON THERE IS NO VIOLATION OF LOCKETT V. OHIO, 438 U.S. 586 (1978) OR THE REQUIREMENT THAT THERE BE INDIVIDUALIZED SENTENCING AND CERTIORARI SHOULD BE DENIED

Relying on Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), petitioner cites four instances in which he

claims that he was precluded from adducing, as a mitigating factor, certain aspects of his character or record.

Upon review of the authorities primarily relied upon by defendant Lockett, supra, Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct.869 (1982), etc., and their progeny, Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), etc., one notes that while recounting the fact that the states may not limit, either by statute or instruction, the jury's right to consider proof of any circumstance or combination of circumstances surrounding the life and character of the defendant that would be reasonably relevant to the question of whether he should suffer death or be sentenced to life in prison, there has not been a plethora of discussion on the actual particular rules of evidence applicable to sentencing procedures. After extensive

research on the question we have found only (4) Federal cases discussing this precise question. See: Shriner v. Wainwright, 715 F.2d 1452 (11th Cir. 1983) (description of death by electrocution not admissible); Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), rv'd on other grounds, ___ U.S. ___, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) (description of execution by lethal gas not admissible); Young v. Zant, 727 F.2d 1489 (1984) (testimony concerning the type of rehabilitative program that could return petitioner to useful member of society properly excluded).

The fourth and probably most instructive was the Supreme Court's discussion of the application of the Georgia rules of evidence to the sentencing phase in Green v. Georgia, 442 U.S. 95, 60 L.Ed.2d 788, 99 S.Ct. 2150 (1979). Focusing on a situation quite similar to that in Chambers v. Mississippi, 410 U.S. 284, 83 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the Georgia

courts excluded the testimony of a third party during the sentencing phase to the effect that Green's co-defendant had stated that he and not Green was the perpetrator of the crime. In reversing the Georgia Supreme Court, this Court in Green, supra, stressed the unique factual case presented stating:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see Lockett v. Ohio, 438 U.S. 586, 604-605, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops. 3d 26 (1978) (plurality opinion); id., at 613-616, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops., 3d 26 (opinion of Blacksun, J.), and substantial reasons existed to assume its reliability. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State

> considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it. In these unique circumstances, "the hearsay rule may not be applied mechanistically to defeat the ends of justice. Chambers v. Mississippi, 410 U.S. 284, 302, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973). Because the exclusion of Pasby's testimony denied petitioner a fair trial on the issue of punishment, the sentence is vacated and the case is remanded for further proceedings not inconsistent with this opinion.
>
> 442 U.S. at 97.

The Court of Appeals for the Fifth Circuit commented on Green in Barefoot v. Estelle, 697 F.2d 593 (5th Cir. 1983), Aff'd,___ U.S.___, 77 L.Ed.2d 1090, 103 S.Ct. 3383 (1983):

> In Green, the state court excluded evidence that the accused's codefendant had actually killed the victim. This evidence consisted of a hearsay statement by the codefendant to a friend. The Court reversed stating:
>
> > Regardless of whether the proferred testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to

> a critical issue, in the punishment phase of the trial . . . . (emphasis added)
>
> 442 U.S. at 97, 99 S.Ct. at 2151. We think that Green is limited to its facts, and certainly did not federalize the law of evidence. It does, however, indicate that certain egregious evidentiary errors may be redressed by the due process clause.
>
> 697 F.2d at 597.

Several conclusions and deductions can be made from these cases. First, it is obvious that while the rules of evidence have been relaxed they certainly have not been abolished. In this regard, we note that a defendant may not be precluded from producing evidence on any aspect of his life, character and record or any circumstance of the offense in mitigation of sentence. Second, while proof is guided by the bounds of relevancy, there are other rules of evidence which may come to bear; i.e., competency, privilege, materiality, etc. We doubt anyone would question the exclusion of hearsay testimony where the declarant is available to testify, or the introduction of

privileged testimony over the objection of the one entitled to invoke the privilege. As the Fifth Circuit pointed out in Barefoot, in light of Chambers, under Green we must assume that within certain boundaries the rules of competency still apply at sentencing.

Generally speaking, relevancy has been defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Rule 401, Fed. R. Evid. Looking briefly to hornbook law we find that McCormick has noted:

> Relevancy in logic is the tendency of evidence to establish a proposition which it is offered to prove. Relevancy, as employed by judges and lawyers, however, is the tendency of the evidence to establish a material proposition. Thus, as James points out, "evidence may be excluded as 'irrelevant' for two quite distinct reasons: because it is not probative of the proposition at which it is directed, or because that

proposition is not provable in the case."

McCormick, Evidence at p. 435 (1972).

Following the Green/Barefoot line of authority it is clear that the effort to introduce evidence of Jordan's invention through Russell was hearsay and could have properly been introduced through Jordan when he took the stand. Testimony regarding the invention from Jordan would not have been "objectionable on the ground of hearsay testimony, and he may have been able to establish it as being relevant in his behalf." As the court below stated, Jordan "was not interrogated by his counsel as to, nor did he attempt to testify to, the matters sought to be elicited from Rhett Russell." 464 So.2d at 485.

Looking to the testimony introduced through Lucius Brown relative to Jordan's incarceration in the Maximum Security Unit we find that it clearly shows that some degree of trust was placed in Jordan and that he had a

relatively clean disciplinary record while incarcerated. Brown's subjective opinions concerning Jordan's cooperativeness and trustworthiness were irrelevant to the matter at hand. Also, without more, Brown was not qualified to give an opinion as to whether or not Jordan could be rehabilitated. There was no effort to qualify Brown as an expert in any field dealing with rehabilitation of prisoners.

Jordan's cousin, Shirley Thames, had not seen Jordan since 1973, some ten (10) years prior to this trial and some three (3) years prior to the commission of the crime. She was allowed to testify with considerable latitude as to certain familial traits exhibited by Jordan and his reputation for violence. The only objections sustained were to specific questions concerning petitioner's relations with his wife of which she had no personal knowledge. This was clearly hearsay and not admissible.

Finally, we note that defendant's brother Robert H. Jordan was allowed to testify that his brother had a good reputation for peace and violence in the community. The only objection came when the brother was asked to explain why this was so. The rule in Mississippi and under the Federal Rules of Evidence is that you may not prove character traits by proof of specific past actions. One is limited to offering testimony as to general reputation. Winters v. State, 449 So.2d 766, 768-69 (Miss. 1984); Rule 608, Fed. R. Evid. There was no error here.

In any event it can hardly be said that the testimony concerning petitioner's actions and behavior while he was sitting on death row could be relevant in this case. The entire time petitioner was on death row he was either fighting the death sentence he was under or preparing for retrial on the issue of sentence once he had been successful in getting the

original sentence overturned. There is no indicia of reliability in the manner in which petitioner conducts himself while on death row while under a death sentence. It can do nothing but benefit him become the model prisoner and to set himself to some outwardly worthwhile task. It tells us nothing that is relevant to his receiving the death sentence on retrial. Petitioner's whole reason for conducting himself as he does on death row is skewed to meet the demands of offering mitigating circumstances on retrial.

The case here is not the case found in Green, supra, as the issue petitioner wished to introduce did not go to the very heart of the sentencing process. The evidence related to matters only tenuously connected with the issues on sentencing. The provisions of the Mississippi statute are constitutional both as written and applied. There being no violation

of the federal constitutional rights guaranteed petitioner certiorari should be denied.

2. THE COURT SHOULD DENY THE WRIT BECAUSE THE RATIONALE UNDERLYING THE STRICT INTERPRETATION OF THE STATUTORY AGGRAVATING CIRCUMSTANCES OF "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" in GODFREY V. GEORGIA, 446 U.S. 420 (1980) IS NOT APPLICABLE UNDER THE MISSISSIPPI CAPITAL MURDER STATUTORY FRAMEWORK

We begin our consideration of this subject with a discussion of the elemental framework of the statute. A comparative review of the capital murder statutory framework in this country varies arithmetically with the number of states. Practically speaking no two statutes are alike. Eg., Compare the statutory framework discussed in Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). Of the aforesaid, the substantive definition of capital murder in Mississippi

resembles that of Texas, Vernon's Tex. Code Ann., Penal Code § 19.03, more so than any other state. Jackson v. State, 337 So.2d 1242 (Miss. 1976).

Capital murder is substantively defined in Miss. Code Ann. § 97-3-19(2) (Supp. 1983) as:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> (a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman . . .;
>
> (b) Murder which is perpetrated by a person who is under sentence of life imprisonment;
>
> (c) Murder which is perpetrated by any use or detonation of a bomb or explosive device;
>
> (d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principles;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, sexual battery, unnatural intercourse with any child under the age of twelve (12), or non-consensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

(f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felony;

(g) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

This Court has recently discussed capital sentencing as a narrowing concept. In California v. Ramos, ____ U.S. ____, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983), Justice O'Conner speaking for the Court stated:

> In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the procedure by which the State

imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of person eligible for the death penalty. In Gregg v. Georgia, 426 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976), and its companion cases, the Court reviewed the capital sentencing schemes of five states to determine whether those schemes had cured the constitutional defects identified in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972). In Gregg itself, the joint opinion of Justice Stewart, Powell, and Stevens concluded that the Georgia sentencing scheme met the concerns of Furman by providing a bifurcated proceeding, instruction on the factors to be considered, and meaningful appellate review of each death sentence. 428 U.S. at 189-195, 49 L.Ed.2d 859, 96 S.Ct. 2909 (opinion of Stewart, Powell, and Stevens, J.J.). Satisfied that these procedural safeguards "suitably directed and limited" the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action," id., at 189, 49 L.Ed.2d 859, 96 S.Ct. 2909, the joint opinion did not undertake to dictate to the state the particular substantive factors that should be deemed relevant to the capital sentencing decision. Indeed, the joint opinion observed: "It seems clear that the problem [of channeling jury discretion] will be alleviated if the jury is given

guidance regarding the factors about the crime and the defendant that the state, representing organized society, deems particularly relevant to the sentencing decision." Id., at 192, 49 L.Ed.2d 859, 96 S.Ct. 2909 ("the deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'").

77 L.Ed.2d at 1179-80.

In Zant v. Stephens, ____ U.S. ____, 77 L.Ed.2d 235, 247-52, 103 S.Ct. ____ (1983) the Court elaborated upon the "narrowing" concept:

> In Georgia, unlike some other States, the jury is not instructed to give any special weight to any aggravating circumstances, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard. Thus, in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of person convicted of murder who are eligible for the death penalty. For this reason, respondent argues that Georgia's statutory scheme is invalid

under the holding in Furman v. Georgia.

A fair statement of the consensus expressed by the Court in Furman is "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909 (1976) (opinion of Stewart, Powell, and Stevens, J.J.) After thus summarizing the central mandate of Furman, the plurality opinion in Gregg set forth a general exposition of sentencing procedures that would satisfy the concerns of Furman, id., at 189-195, 49 L.Ed.2d 859, 96 S.Ct. 2909. But it expressly stated, "We do not intend to suggest that only the above-described procedures would be permissible under Furman or that any sentencing system constructed along these general lines would inevitable satisfy the concerns of Furman, for each distinct system must be examined on an individual basis." Id., at 195, 49 L.Ed.2d 859, 96 S.Ct. 2909. The opinion then turned to specific consideration of the constitutionality of Georgia's capital sentencing procedures. Id., at 196-207, 49 L.Ed.2d 859, 96 S.Ct. 2909.

Georgia's scheme includes two important features which the plurality described in this general

discussion of sentencing procedures that would guide and channel the exercise of discretion. Georgia has a bifurcated procedure, see id., at 190-191, 49 L.Ed.2d 859, 96 S.Ct. 2909, and its statute also mandates meaningful appellant review of every death sentence, see id., at 195, 49 L.Ed.2d 859, 96 S.Ct. 2909. The statute does not, however, follow the Model Penal Code's recommendation that the jury's discretion in weighting aggravating and mitigating circumstances against each other should be governed by specific standards. See id., at 193, 49 L.Ed.2d 859, 96 S.Ct. 2909. Instead, as the Georgia Supreme Court has unambiguously advised us, the aggravating circumstances merely performs the function of narrowing the category of person convicted of murder who are eligible for the death penalty.

Respondent argues that the mandate of Furman is violated by a scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute. But that argument could not be accepted without overruling our specific holding in Gregg. For the Court approved Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's

consideration of aggravating and mitigating circumstances.

The plurality's approval of Georgia's capital sentencing procedure rested primarily on two features of the scheme: That the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. These elements, the opinion concluded, adequately protected against the wanton and freakish imposition of the death penalty. This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." 428 U.S. at 195, n. 46, 49 L.Ed.2d 589, 96 S.Ct. 2909. To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Thus, in Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1930), the Court struck down an aggravating circumstance that failed to narrow the class of persons eligible for the death penalty. Justice Stewart's opinion for the plurality concluded that the aggravating circumstance described in subsection (b)(7) of the Georgia statute, as construed by the Georgia Supreme Court, failed to create any "inherent restraint on the arbitrary and capricious infliction of the death sentence," because a person of ordinary sensibility could find that almost every murder fit the stated criteria. Id., at 428-429, 64 L.Ed.2d 398, 100 S.Ct. 1759. Moreover, the facts of the case itself did not distinguish the murder from any other murder. The plurality concluded that there was "no principled way to distinguish this case, in which the death penalty was imposed from the many in which it was not." Id., at 433, 64 L.Ed.2d 398, 100 S.Ct. 1759. Our cases indicate, then, that statutory aggravating circumstances play a constitutionality necessary function at the stage of legislative definition; they circumscribe the class of person eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting; from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage

is an individualized determination on the basis of the character of the individual and the circumstances of the crime. See Eddings v. Oklahoma, 455 U.S. 104, 110-112, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982); Lockett v. Ohio, 438 U.S. 586, 601-605, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978) (plurality opinion); Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-37, 52 L.Ed.2d 637, 97 S.Ct. 1992 (1977); Gregg, supra, at 197, 49 L.Ed.2d 859, 96 S.Ct. 2909 (plurality opinion); Proffitt v. Florida, 428 U.S. at 251-252, 49 L.Ed.2d 912, 96 S.Ct. 2960 (plurality opinion); Woodson v. North Carolina, 429 U.S. 280, 303-304, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976) (plurality opinion).

The Georgia scheme provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage. We therefore must remain convinced, as we were in 1976, that the structure of the statute is constitutional. Moreover, the narrowing function has been properly achieved in this case by the two valid aggravating circumstances upheld by the Georgia Supreme Court - that respondent has escaped from lawful confinement, and that he had a prior record of conviction for a capital felony. These two findings adequately differentiate this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be

> imposed. Moreover, the Georgia Supreme Court in this case reviewed the death sentence to determine whether it was arbitrary, excessive, or disproportionate. Thus the absence of the legislative or court-imposed standards to govern the jury in weighing the significance of either or both of those aggravating circumstances does not render the Georgia capital sentencing statute invalid as applied in this case.

We note in particular discussion of this concept in the context of statutes like those in Texas and Mississippi by the Court in Zant v. Stephens, supra.

> The plurality opinion issued the same day in Jurek v. Texas, 428 U.S. 262, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976), makes clear that specific standards for balancing aggravating circumstances are not constitutionally required. In Jurek we held that the State's action in "narrowing the categories of murders for which a death sentence may ever be imposed" served much the same purpose as the lists of statutory aggravating circumstances that Georgia and Florida had adopted. Id., at 270, 49 L.Ed.2d 929, 96 S.Ct. 2950. We also held that one of the three questions presented to the sentencing jury permitted the defendant to bring mitigating circumstances to the jury's attention. Id., at 273-274, 40

> L.Ed.2d 929, 96 S.Ct. 2950. Thus, in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution and certainly were not explicitly balanced against each other.
>
> 77 L.Ed.2d at 429, n. 13.

Therefore, by narrowing the categories of murder in which the death sentence may be imposed at the inception of the case, Mississippi has complied with the constitutional mandate of Jurek and Stephens. Consequently, the aggravating factors found in Miss. Code Ann. § 99-19-101 (Supp. 1984) do not serve the same purpose in Mississippi as they do, for instance, as in Florida or Georgia. We note that the arguments advanced by petitioner have been rejected by the Mississippi Supreme Court in several recent cases. Billiot v. State, 454 So.2d 455 (Miss. 1984), cert. denied, _____ U.S. _____ (No. 84-5783, 1985); Edwards v. State, 441 So.2d 84 (Miss. 1983); Tokman v. State, 435 So.2d 664 (Miss. 1983),

cert. denied, ____ U.S. _____, 104 S.Ct. 3547, 82 L.Ed.2d 850 (1984); Gilliard v. State, 428 So.2d 576 (Miss. 1983), cert. denied, _____ U.S. ____ (No. 82-6775, 1983); Evans v. State, 422 So.2d 737 (Miss. 1982), cert. denied, ____ U.S. _____ (No. 82-6267, 1983); Bullock v. State, 391 So.2d 601 (Miss. 1980), cert. denied, 452 U.S. 931 (1981); Culberson v. State, 379 So.2d 499 (Miss. 1980), cert. denied, 449 U.S. 986 (1980); Reddix v. State, 381 So.2d 999 (Miss. 1980), cert. denied, 449 U.S. 986 (1980); Jones v. State, 318 So.2d 933 (Miss. 1980), cert. denied, 449 U.S. 1003 (1980). See also: Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), reh. denied, 685 F.2d 139 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983), reh. denied, 462 U.S. 1124 (1983).

Summarizing the foregoing, we find that Stephens, Barclay, ___U.S.___, 77 L.Ed.2d 1134, 103 S.Ct. 3418 (1983), and Romas reflect a clear understanding and acceptance of diverse methods of achieving a narrowing of the class

of persons eligible for the death penalty and thereby justifying the imposition of a more severe sentence. Viewed in proper context, Stephens turns heavily on consideration of the Georgia death penalty statute, a scheme whereby any first degree murderer may receive the death penalty where one or more aggravating circumstande is found. Thus, the only narrowing in the Georgia system takes place in the finding of aggravating circumstances. Cf., Godfrey v. Georgia, 446 U.S. 420 (1980). Conversely, in Mississippi capital defendants must satisfy more than the single criterion on intentional murder. Built into the structure is a requirement that some added element be present; i.e., an accompanying felony, law officer as victim, etc. See ?Miss. Code Ann. § 99-3-19 (Supp. 1983). In other words, as the Court noted in Jurek, supra, Mississippi has incorporated many of the aggravating circumstances found in the Florida and Georgia

statutes in its definition of the substantive offense. Increasing the protection to the defendant is the requirement that circumstances supporting or diminishing the death sentence be weighed one against the other. In sum, the Mississippi statute is unique and there is no valid compulsion for measuring its constitutionality solely in deference to a separate and different system of thought and practice. The distinguishing process required from state to state was recognized in Stephens. States may vary their respective procedures so long as the penalty phase provides for an "individualized determination on the basis of the character of the individual and the circumstances of the crime." Stephens, 77 L.Ed.2d at 251.

Within the context of the Stephens, Barclay, and Ramos line of cases, Mississippi has narrowed the classes of individuals eligible to receive a death sentence by

limiting the situation in which the crime may be charged. Consequently, the potential abuse discussed in Godfrey could not arise in Mississippi. Additionally, the State has established certain procedural safeguards in the form of a required finding of an aggravating circumstances beyond a reasonable doubt and the required weighing of aggravating and mitigating circumstances to suitably limit and direct the jury's discretion so as to minimize the risk of arbitrary and capricious action.

Upon consideration of the statutory scheme as a whole, the aggravating circumstances in Mississippi do not serve in part the same purposes of functions as those in Georgia. In particular one of the principal functions of aggravating circumstances in the Georgia scheme is to limit those eligible for death. This function in Mississippi is served by the substantive definition of the crime. The

aggravating and mitigating circumstances, on the other hand, were included within the system in order to give the jury sufficient tools to give individualized consideration to the character and life of the defendant and his crime.

In limiting the circumstances in which death may be imposed and in providing a procedural system by which the jury before passing sentence may undertake an individualized consideration of the defendant and his crime, Mississippi has accomplished the required "narrowing" and by such "suitably directed and limited the jury's discretion so as to minimize the risk of wholly arbitrary and capricious action . . . ." Ramos, 77 L.Ed.2d at 1179. Such is all the Constitution requires. The State is, therefore, free to establish and define the aggravating circumstances it deems appropriate without interference from the

Federal judiciary. Ramos, supra; Barclay, supra.

Respondent, therefore, submits that the claim lacks merit and certiorari should be denied.

3. WHERE THE COMMENTS OF THE PROSECUTOR DURING THE CLOSING ARGUMENTS OF THE SENTENCE PHASE RELATING TO THE FACT THAT PETITIONER HAD NOT TESTIFIED AT PREVIOUS TRIALS DID NOT VIOLATE ANY RIGHTS GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH, OR FOURTEENTH AMENDMENTS CERTIORARI SHOULD BE DENIED.

In the court below petitioner raised allegations that the prosecutor made improper references to his prior exercise of his Fifth Amendment right not to testify and that he made "other highly improper and prejudicial remarks." His major thrust below was that it was improper to comment on the fact that petitioner was silent in his two prior trials, only minor mention was made of the other parts of the argument. On this petition he now

raises this same issue here; however, he has made substantial alterations in the thrust of the argument raising things that he did not present to the court below. The thrust of the argument now is the "other highly improper and prejudicial remarks". We must look to see which of those were presented to the court below and which were not as petitioner has made no distinction. Those things in this argument that were not specifically raised below or addressed by the court below cannot be raised here for the first time. Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981); Street v. New York, 394 U.S. 576, (1969); Cardinale v. Louisiana, 394 U.S. 437 (1969).

The argument petitioner made the cornerstone of his argument below only merits two paragraphs here. We find from the record from the prior two (2) trials indicates that Jordan elected not to testify either at the

culpability or sentencing stages of trial. Based on substantial evidence, including three (3) confessions, he was found guilty. Only during the resentencing hearing conducted after a grant of habeas corpus relief by the Court of Appeals for the Fifth Circuit did Jordan elect to testify in his own behalf.

Jordan's testimony in this resentencing proceeding was substantially more than a plea for mercy and directly refuted evidence introduced during the earlier guilt phase of his trial. He stated that his comments concerning his marksmanship were not true, and he explained to the jury his version of how the murder occurred. Specifically, he told the jury that he did not intentionally shoot Mrs. Marter and that the killing was accidential.

Petitioner relies here on Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Griffin chose not to testify during the culpability portion of his

bifurcated capital trial, but he did testify at the sentencing hearing. The trial judge in Griffin instructed the jury that is was permissible to draw unfavorable inferences from the defendant's failure to testify. The prosecutor's comments and the judge's instruction were on the issue of guilt that occurred before the jury reached its verdict. The Court held that it is unconstitutional for the prosecutor to comment on the defendant's silence during trial by suggesting an inference of guilt from the defendant's failure to testify in refutation of facts within his knowledge.

The Griffin circumstances are similar to those of the instant case, however, two (2) salient facts are different. First, in addition to the prosecutor's comment the court, in Griffin, instructed the jury that it could make unfavorable inferences from the defendant's silence. In the instant case, the

prosecutor's comment was not designed to suggest an inference of guilt, for guilt had already been determined, but rather the prosecutor's comment was intended to impeach petitioner's credibility. Second, in Griffin, the comment and instruction occurred during the culpability phase of the capital trial and before the defendant testified at the sentencing hearing. Here, the prosecutor's comment occurred after guilt had been determined and after the defendant had voluntarily testified during the sentencing hearing. Griffin therefore does not offer petitioner any solace.

The court below correctly relied on Calloway v. Wainwright, 409 F.2d 59 (5th Cir. 1968) and Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1984) in deciding the issue at hand. The Mississippi Supreme Court stated:

> We distinguish that case [Griffin v. California] from the case sub judice. In Calloway v.

Wainwright, 409 F.2d 59 (5th Cir. 1968), the Court said:

> It is clear that when a defendant voluntarily testifies to the merits, and not just upon a purely collateral matter, the prosecutor may comment upon the defendant's failure to deny or explain incriminating facts already in evidence.

In Tucker v. Francis, 723 F.2d 1504, 1511-12 (11th Cir. 1984), the Court addressed the question in the following language:

> It is not fundamentally unfair to comment on the appellant's silence during the culpability phase as juxtaposed with his exculpatory testimony during the sentencing phase. A defendant is usually told that so long as he does not testify, his failure to testify will not be used against him. In this case, Richard Tucker's failure to testify was not used against him during that portion of his trial in which he invoked the fifth amendment. After he waived his fifth amendment privilege by testifying, any expectations of protection from adverse comment also were waived.

See also Raffel v. United States, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054 (1926); McGahee v. Massey, 667 F.2d 1357

(11th Cir. 1982) on waiver.

464 So.2d at 482.

The court below was correct in its analysis and certiorari should be denied.

The "other highly improper and prejudicial remarks" section of petitioner's argument below has now been blown into the major portion of his argument here. The only thing that petitioner fails to point out is that the court below did not address any other issues concerning the arguments of counsel. This was correct as those errors were not properly preserved for argument in the court below by a contemporaneous objection. There were only two objections made during the entire closing argument of the prosecution. These two objections are found in the transcript on pages 1091 and 1104-05. See: App. 64a and 74a-75a. The one found on page 1091, 64a, related to the mention of the fact that petitioner did not testify in his prior trials. That issue has

been dealt with above. The second and final objection raised at trial was to the following comment:

> Justice demands it. Edwina Marter demands it, and those two kids demand it. You talking about society; Kevin is not ten (10). He was three (3) when his mother died. The oldest son is seventeen (17). They are the ones who are going to look back and see what justice is. My momma was shot down in the woods with a .38, and her murderer got life imprisonment.--Cause momma was taken from the house, see.
> BY MR. STEGALL: We are going to object to that sort of argument.
> BY THE COURT: Overruled.

Tr. 1104-05, 74a-75a.

Once the objection was overruled the prosecutor did not return to the subject. The argument was completed without further objection by the petitioner. It is true that petitioner raised this in his brief before the Mississippi Supreme Court and because of the objection the question was properly before the court below. App. 95a. The court below did not address the issue; therefore, this Court

does not have jurisdiction to consider the matter under the ruling of Cardinale, supra. The Court stated:

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet. 368, 9 L.Ed. 458 (1863), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. If both of these do not appear on the record, the appellate jurisdiction fails. 10 Pet. 368, 391, 9 L.Ed. 458, 467.

[Emphasis added] 22 L.Ed.2d at 400.

The ruling in Cardinale, supra, is the complete answer to the question, we cannot speculate what the decision of the court below would have been had they spoken to the issue. It is interesting to note that petitioner did not raise the fact that the question had not been addressed in his petition for rehearing in

the court below, the proper place to have raised such a question. Can it be said that petitioner has abandoned the claim by not raising it before the court below on petition for rehearing.

The two comments mentioned above are the only two alleged errors properly preserved by petitioner for presentation in the Court below. The other portions of the argument that petitioner now raises were not objected to at trial and, therefore, not properly preserved for presentation to the court below. In Hill v. State, 432 So.2d 427 (1983), the Mississippi Supreme Court stated:

> In this case, however, there was no objection made to this argument. We have consistently held that contemporaneous objection must be made to improper argument by the state, and unless such objection is made, any claimed error for such improper argument will not be considered on appeal. See Coleman v. State, 378 So.2d 640 (Miss. 1979); Thomas v. State, 358 So.2d 1311 (Miss. 1978); Griffin v. State, 292 So.2d 159 (Miss. 1974); Myers v.

State, 268 So.2d 353 (Miss. 1972); Peterson v. State, 242 So.2d 420 (Miss. 1970); Ford v. State, 227 So.2d 454 (Miss. 1969); Showers v. State, 227 So. 452 (Miss. 1969); and Coburn v. State, 250 Miss. 684, 168 So.2d 123 (1964). It need also be noted that this holding has applied to death penalty cases, as well as other criminal and civil cases.

432 So.2d at 439-40.

This Court has no jurisdiction to pass on these alleged errors. Webb v. Webb, supra, states:

> We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court. This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

368 L.Ed.2d at 396.

See: Street v. New York, supra; Chambers v. Mississippi, 410 U.S. 284 (1973); Bailey v. Anderson, 326 U.S. 203 (1945). The facts

support the assumption that the issue was not properly raised below.

There being no question of substantial constitutional merit raised certiorari should be denied.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing **Brief in Opposition** to the following:

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This, the 20th day of July, 1985.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.